Bourdon v. Loughren, et al., No. 03-196

OAKES, Senior Circuit Judge, concurring:

I concur in affirming the grant of summary judgment for the defendants on the lone ground that Bourdon has failed to demonstrate sufficient injury or prejudice by the denial of access to establish the requisite standing for a claim under 42 U.S.C. § 1983.

However, I write separately to voice my disagreement with the breadth of the rule announced in the majority's decision and applied to the particular circumstances of this case. While I agree that "the provision of counsel can be a means of accessing the courts," as we recognized in Benjamin v. Fraser, 264 F.3d 175, 186 (2d Cir. 2001), I cannot agree that it is a means of "*fully* satisfying a state's constitutional obligation to provide prisoners, including pretrial detainees, with access to the courts." Decision at page 11 of majority opinion (emphasis added). There may be other aspects of the right of access that a state may not constitutionally obstruct despite the provision of counsel. Indeed, in Benjamin v. Fraser, when considering impediments to pre-trial detainees' ability to visit with counsel, we recognized that a state could not "'unjustifiably obstruct the availability of professional representation *or other aspects of the right of access to the courts*.'" Benjamin 264

F.3d at 187, 188 (emphasis added) (quoting Procunier v. Martinez, 416 U.S. 396, 419 (1974) and determining that "both the due process right of access to the courts and the Sixth Amendment right to counsel are implicated," and that there was no error in measures ordered to remedy undue delays associated with attorney visits). See also Lane v. Brown, 372 U.S. 477, 480-81 (1963) (holding that the state could not deny an indigent criminal appellant a transcript to appeal pro se from the denial of a writ of error coram nobis, or permit that the appellant, "at the will of the Public Defender, be entirely cut off from any appeal at all").

Nor can I agree with the majority's holding that a state's affirmative obligation to provide access to the courts can be measured without reference to the Sixth Amendment's guarantee of effective assistance of counsel, or that the mere fact of appointed counsel affords meaningful and constitutionally acceptable access to the courts. A defendant whose counsel fails to meet the minimum constitutional standards of effectiveness is not represented at all, and to deny that defendant all other means of communicating with the court most certainly is a deprivation of constitutional proportions, implicating not only the constitutional right of access, but also the Sixth Amendment

right to a defense. "[O]ne of the most serious deprivations suffered by a pretrial detainee is the curtailment of his ability to assist in his own defense." Wolfish v. Levi, 573 F.2d 118, 133 (2d Cir. 1978) (cited in Benjamin, 264 F.3d at 185).

While a defendant does not necessarily have a constitutional right to hybrid representation, I do not believe that the state may constitutionally bar a defendant represented by ineffective counsel from meaningfully accessing the court in propria persona in order to preserve his right to an effective defense at such a critical stage of the proceedings.

A defendant who has chosen to defend against charges with the assistance of appointed counsel certainly "surrenders the right to make the ultimate decision on a wide variety of matters." Ennis v. LeFevre, 560 F.2d 1072, 1075 (2d Cir. 1977). "Of course, if counsel failed to press an argument that had obvious merit, United States ex rel. Maselli v. Reincke, 383 F.2d 129 (2d Cir. 1967); or if he failed to act as an advocate on petitioner's behalf, Anders v. California, 386 U.S. 738 (1967); or if counsel failed to obtain an adequate record, Entsminger v. Iowa, 386 U.S. 748 (1967); or if he failed to make a conscientious investigation, United States ex rel. Brown v. Warden, [417 F.Supp. 970, 974 (N.D. Ill. 1976)], then petitioner

may have been denied the effective assistance of counsel, and that issue may be raised notwithstanding the otherwise binding nature of the challenged decision made by counsel." Ennis, 560 F.2d at 1076 (parallel citations omitted).

Judge Gurfein, concurring in Ennis, stated: "Nor would I agree to a general statement that once a defendant has a lawyer, *everything* and *anything* he asserts must fall on deaf ears. While it is generally true that one cannot have a lawyer and act *pro se* at the same time, there may be exceptions of constitutional magnitude which should not be foreclosed by generalization." 560 F.2d at 1077 (emphasis in original).

In this case, Bourdon has not demonstrated sufficient injury to establish a claim under § 1983. But, in other circumstances, the rule announced in today's decision could permit a state to foreclose a defendant from raising claims of constitutional magnitude by interposing the fact of representation, regardless of its effectiveness. Therefore, I concur only in the result of today's decision.